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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 78-1261

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NORMAN A. CARLSON, DIRECTOR, FEDERAL  
BUREAU OF PRISONS, *et al.*,  
v. *Petitioners,*

MARIE GREEN, ADMINISTRATRIX OF THE  
ESTATE OF JOSEPH JONES, JR.

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Seventh Circuit

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**BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL  
RIGHTS UNDER LAW AS *AMICUS CURIAE***

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL  
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INTEREST OF *AMICUS CURIAE* \*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, several past Presidents of the American Bar Association, a number of law school deans, and many of the nation's lead-

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\* Letters from counsel for the parties to this action consenting to the filing of this brief have been tendered to the Clerk pursuant to Sup. Ct. Rule 42(2).

ing lawyers. Through its national office in Washington, D.C. and its offices in Jackson, Mississippi and eight other cities, the Lawyers' Committee over the past sixteen years has enlisted the services of over a thousand members of the private Bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

For many years, the Committee has been actively involved in litigation on behalf of racial minority persons seeking redress for violations of their constitutional rights. Although most of this litigation was brought against state officials pursuant to 42 U.S.C. § 1983, the Committee has also provided assistance to individuals pursuing claims of racial discrimination by officers of the federal government. As a result of its experience in such lawsuits, *amicus* is particularly concerned about the availability of an effective federal remedy for misconduct by law enforcement and correctional officials which results in the death of the victim.<sup>1</sup> This interest motivated the Committee's *amicus* participation on several occasions over the past several Terms, as this Court grappled with the relationship between state procedural law and federal damages actions for violations of constitutional rights.

<sup>1</sup> While blacks and other minorities are by no means the exclusive victims of such brutality, the truth of the matter is that there is frequently a connection between race and official lawlessness. The plaintiff's complaint in this case, for example, states that during the period from January 6 to August 14, 1975, four prisoners at the Federal Prison at Terre Haute, Indiana—all of them black—died after receiving medical "care" so abysmal as to evidence intentional maltreatment. The Complaint alleges that the fact that all of those who died were black is not coincidental, that non-white prisoners were the last to receive what meager medical attention was available and were the last to be admitted to the prison hospital. The Complaint alleges that the course of events preceding Joseph Jones' death "was caused in part by the fact that the deceased was black, and he was denied basic humane medical treatment, which resulted in his death, on the basis of race, . . ." (R. 4, 10).

In *Jones v. Hildebrand*, 432 U.S. 183 (1977) and *Robertson v. Wegmann*, 436 U.S. 584 (1978), we suggested in *amicus* briefs that borrowing state survival and wrongful death statutes in actions brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, would cause many victims of official misconduct to be deprived of any effective remedy and would undermine the deterrent purposes of the legislation. Because of provisions which limit the amount of damages recoverable, or which permit recovery only by designated survivors, such statutes in many instances will cause a § 1983 action to abate if they are controlling on the procedural aspects of the suit. That result is not consonant with the purposes underlying constitutional tort litigation.

In this suit to redress an alleged violation of the Fifth Amendment, the petitioners seek to escape from being held fully liable for their unconstitutional actions by requiring that the court hearing the suit adopt the damages limitations of the forum state's "wrongful death" statute.<sup>2</sup> Petitioners claim that statute is applicable even though the Complaint, and the record, clearly establish that respondent brought this action on behalf of her son's estate, and not to recover for an injury to her own property interests. Compare *Jones v. Hildebrand*, *supra*, 432 U.S. at 187-88. Further, they claim that the law of the forum state is not "generally inhospitable" to con-

<sup>2</sup> The immediate result of applying Indiana's damages limitation in the manner suggested by petitioners would be to cause dismissal of this federal lawsuit for failure to meet the jurisdictional amount requirement of 28 U.S.C. § 1331. But even if respondent's timely federal action were held to toll the applicable statute of limitations so that she could refile her Fifth Amendment claim in an Indiana court, see *Jones v. Hildebrand*, *supra*, the state's limitation on recovery of damages will be given application with full force to prevent an award of punitive damages—sought in the Complaint—even though the right to recover punitive damages for violations of constitutional rights has been recognized by this Court. *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978) (*dictum*).

stitutional tort actions even though its "survival" statute would plainly require abatement in all cases in which death is alleged to have resulted from the constitutional violation complained of. *Compare Robertson v. Wegmann, supra*, 436 U.S. at 594.

Because we believe that petitioners have incorrectly considered Indiana's "wrongful death" and "survival" statutes to be interchangeable, and because the result sought by petitioners can be achieved only by diluting the choice-of-law principles announced by this Court in *Robertson v. Wegmann, supra*, the Lawyers' Committee files this *amicus* brief.

#### STATEMENT OF THE CASE

This is a suit for damages based upon the federal Constitution, seeking redress for the death of Joseph Jones, who died while a prisoner at the federal penitentiary at Terre Haute, Indiana. The plaintiff (respondent here) is Marie Green, the decedent's mother. She brought this suit as administratrix of her son's estate. The most basic factual allegations of the Complaint about Jones' death are adequately set forth in petitioners' Brief.

The district court held that the Complaint stated a constitutional claim under *Estelle v. Gamble*, 429 U.S. 97 (1976), and that if Jones were alive he could maintain an action under 28 U.S.C. § 1331. But because, at common law, death extinguished any cause of action personal to a decedent, the court held that respondent's suit could be maintained only if it were permitted under Indiana law. The district judge ruled that "it is apparent that the plaintiff seeks the benefit of the [Indiana] wrongful death statute to provide her with standing [*sic*] to bring this action on behalf of her son's estate," and that under that statute respondent's recovery could not

possibly amount to \$10,000.<sup>3</sup> Therefore, the court ruled that it lacked subject matter jurisdiction.<sup>4</sup> The action was dismissed.

<sup>3</sup> Where a decedent leaves no spouse or *dependent* next of kin, Indiana's wrongful death statute limits recovery to reasonable medical and funeral expenses and the costs of estate administration. *See* note 40 *infra*.

<sup>4</sup> In dismissing the plaintiff's action on January 10, 1977, the district court said (Pet. App. 25a-27a):

With respect to the jurisdictional amount issue herein, the Court is aware that "liberal standards" are to be used in ascertaining the existence of the necessary amount in controversy in cases brought under § 1331 alleging a constitutional denial. *Calvin v. Conlisk*, 520 F.2d 1, 9 (7th Cir. 1975), *vac.* on other grounds, 424 U.S. 902 (1976). In light of such standard, the Court believes that given the serious allegations of the complaint herein if Jones were alive today he could properly maintain an action under § 1331 alleging a denial of proper medical treatment. *Estelle v. Gamble, supra*. However, since Jones has died neither leaving any dependents nor having incurred medical or burial expenses sufficient to satisfy the \$10,000 requirement, it is not possible for the plaintiff herein to maintain this action under the Indiana wrongful death or survival statutes. *Ind. Ann. Stats.* §§ 34-1-1-1 - 34-1-1-2 (Burns Code Ed.). Although the plaintiff insists in her brief that this is not an action "for pecuniary loss of support" based on any state statutes like the above, the Court believes that such statutes are the sole mechanism by which the personal representative of a decedent's estate may maintain an action for damages arising from the decedent's death. The plaintiff obviously is attempting to avoid the limitations on recovery inherent in the statutory remedy and characterizes this as an action "of the Estate of one who was deprived of fundamental human rights suing for justice in the form of money damages." The court does not believe that such an action exists other than as set out in the wrongful death and survival statutes.

It is recognized that one person may not generally seek redress for constitutional deprivations suffered by another. *United States v. Raines*, 362 U.S. 17 (1960). At common law, the plaintiff herein could not have maintained an action such as this on behalf of the decedent's estate since such actions did not generally survive the injured person's death. It is apparent the plaintiff seeks the benefit of the wrongful death statute to provide her with standing to bring this action on behalf of Jones' estate, but yet she asserts such statute is

On appeal, the Seventh Circuit agreed with the conclusion that a direct constitutional action for damages was proper. Turning to the question of the survival of that cause of action, the Court of Appeals determined to apply the principles and analysis of *Robertson v. Wegmann*, 436 U.S. 584 (1978), even though respondent's suit was not based on 42 U.S.C. § 1983. Accordingly, the Court of Appeals examined the law of the forum state concerning survival of actions.

Indiana has both a "survival" statute (Ind. Code Ann. § 34-1-1-1) and a "wrongful death" act (Ind. Code Ann. § 34-1-1-2).<sup>5</sup> The district court had not discussed the state's "survival" statute, but the Court of Appeals recognized that it was inapplicable to this case because it furnishes a survival mechanism only when death results from injuries *other than* those which are the basis of the cause of action.

The Court of Appeals then rejected the district judge's assumption that the vehicle for respondent's suit was Indiana's "wrongful death" act. As administratrix, the panel held, respondent was asserting her son's cause of action, and not (as authorized by wrongful death statutes) a cause of action for losses, occasioned by his death, to her as a survivor.

Under these circumstances, the Court of Appeals stated, the creation of federal common law permitting survival of the action was necessary to effectuate the policy of

not applicable to her action. The plaintiff should not be able to accept the benefits conferred by such statutes without assuming the limitations imposed therein as well.

<sup>5</sup> Indiana law also creates a distinct wrongful death action for the death of a child, Ind. Code Ann. § 34-1-1-8, but if a child has been emancipated, and is not in the service of the parent, any action must be brought under § 34-1-1-2. See *Childs v. Rayburn*, 52 Ind. Dec. 404, 346 N.E.2d 655, 660 (Ct. App. 1976). It is clear that § 34-1-1-8 has no application to this case.

vindicating constitutional rights which is the basis for the federal cause of action. 581 F.2d at 674.<sup>6</sup>

## SUMMARY OF ARGUMENT

I. The writ of certiorari should be dismissed as improvidently granted.

A. The question whether an adequate Federal Tort Claims Act remedy exists which makes it unnecessary to permit respondent to assert a cause of action directly under the Fifth and Eighth Amendments to the Constitution was never raised below. No basis for departing from this Court's usual practice of limiting review to issues which have been passed upon by the lower courts has been demonstrated by petitioners.

B. The survivorship question, as framed by the petitioners, is simply not in this case. Petitioners have assumed that Indiana's "wrongful death" statute is applicable, but that statute creates a cause of action quite distinct from the constitutional claims asserted by respondent as the legal representative of her son's estate. For precisely this reason, the court below ruled explicitly that the "wrongful death" statute was irrelevant to this

<sup>6</sup> In additional support of its conclusion, the Court of Appeals noted the desirability of uniformity in actions against federal officials. It pointed out that the same action would have survived under Illinois law, which the court had recently "borrowed" pursuant to § 1988 in *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977). The Court expressed its belief that the liability of federal agents for violating constitutional rights should not depend upon where the violation occurs, and it suggested that because federal prison authorities decide the prison facility in which an individual will be incarcerated, in a sense they choose the place where the wrong occurs. 581 F.2d at 675.

It is significant that, because neither of Indiana's statutes were applicable to respondent's cause of action, the Court of Appeals properly gave no consideration to the issue which is the main focus of petitioners' Brief—whether limitations on damages contained in state survival statutes would defeat the federal policies of compensation and deterrence underlying a *Bivens*-type action.

suit, and petitioners have not sought review of that holding. On the other hand, petitioners appear to concede *sub silentio* that creation of federal common law is warranted to keep this action from abating under Indiana's "survival" statute.

II. The Court of Appeals was right in applying federal common law to allow this action to go forward and to vindicate Joseph Jones' constitutional rights.

A. In suits to redress the violation of federal rights, at least where the deprivation of these rights is alleged to have caused death, the ability of the victim's estate or next-of-kin to recover damages for invasion of the decedent's rights cannot turn upon state survival law. Only by creating a uniform federal law of survival applicable to such cases can this Court carry out the twin goals of compensating the victim and deterring illegal conduct which lie at the root of the federal cause of action.

B. If survival of Joseph Jones' cause of action to recover damages for the violation of his constitutional rights is to depend upon an examination of Indiana law rather than a uniform federal rule, nevertheless the judgment below was proper. The only Indiana law relevant to respondent's cause of action imposes an absolute bar to vindication of Jones' constitutional rights and, according to principles developed in decisions of this Court under 42 U.S.C. § 1988 and the Rules of Decision Act, federal common law which avoids that result must be developed and applied to this case. If the foregoing conclusions are incorrect and this Court reaches the issue of the validity of the damages limitations in Indiana's "wrongful death" statute in a federal cause of action to redress death-producing constitutional violations, it should find those limitations inapplicable to this lawsuit. Otherwise federal officials will be subject to no credible deterrent against unconstitutional conduct so long as it results in death, rather than merely in injury.

## ARGUMENT

### I

#### THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. The first Question Presented was neither raised below nor considered by the Court of Appeals and is not properly before this Court.

The government discloses in footnote 9 of the Brief for Petitioners that in the Court of Appeals, it did not argue that the Federal Tort Claims Act provides an adequate remedy for deprivations by federal officers of rights guaranteed by the Eighth Amendment, making implication of a constitutional cause of action unnecessary. While it is true that, in certain exceptional circumstances, this Court will decide issues not raised below, *see, e.g., Duignan v. United States*, 274 U.S. 195, 200 (1927), petitioners offer no such justification for doing so in this case.

In *Youakim v. Miller*, 425 U.S. 231 (1976),<sup>7</sup> cited by petitioners, a unique combination of circumstances<sup>8</sup> jus-

<sup>7</sup> The plaintiffs in *Youakim* had unsuccessfully attacked Illinois' foster care payment program on Equal Protection Clause grounds, then sought in the Jurisdictional Statement to add a claim that the Illinois system was in conflict with the Social Security Act. This Supremacy Clause claim had not been presented to the District Court as a separate ground for challenging the state law. 425 U.S. at 233. This Court addressed the Supremacy Clause issue, but only to the limited extent of vacating the judgment below and remanding the case for consideration of the claim.

<sup>8</sup> The circumstances were: (a) attacks on state welfare statutes frequently combine Equal Protection and Supremacy Clause issues; (b) the statutory issue was not foreign to the subject matter of the complaint; (c) the complaint had alleged as a "factual" matter that the Illinois scheme conflicted with federal policy as set forth in the Social Security Act; (d) statements in the district judge's opinion strongly suggested that if the conflict issue had been ad-

tified an exception to the usual rule limiting review to matters preserved in the lower courts. The Order in that case vacating the judgment and remanding to the district court for further proceedings served the substantial interest of avoiding a decision of constitutional magnitude where the case might be disposed of on other grounds. 425 U.S. at 236. Similar circumstances or policy interests are absent from this case.<sup>9</sup> The Federal Tort Claims Act argument made its first appearance in this case in the Petition for Writ of Certiorari and is unrelated to any argument made below. Cf. *Procunier v. Navarette*, 434 U.S. 555 (1978).

Petitioners advance three grounds not present in *Youakim* as a basis upon which the Court should exercise its discretion to hear the Tort Claims Act issue in this case. First, they argue that the issue mistakenly believed raised in this case was in fact properly preserved in *Moffitt v. Loe* (No. 78-1260). The government's pe-

vanced as a separate ground for decision, it would have been rejected; (e) between the time the Jurisdictional Statement was filed and the date probable jurisdiction was noted, the Department of HEW had issued special instructions which had a direct bearing on the issue; and (f) the Solicitor General had filed a brief in this Court stating the view of the government that the Illinois foster care program was inconsistent with the Social Security Act.

<sup>9</sup> Indeed, the situation before the Court is more closely analogous to that in *Tacon v. Arizona*, 410 U.S. 351 (1973). The petitioner in that case had been tried, convicted and sentenced *in absentia* in state court. On his direct appeal in the state court, he argued that under the circumstances (he was unable to appear on the trial date due to lack of travel funds), the evidence was insufficient to show a voluntary and intelligent waiver of his right to be present at his trial. This Court refused to consider a different question presented in his petition for certiorari: whether a state can, consistent with the Constitution, try a person *in absentia* who has left the state and cannot return for lack of funds. The Court held that these broad issues were not passed upon by the state Supreme Court, and that the only related issue (the question of waiver) was primarily factual and did not justify the exercise of the *certiorari* jurisdiction.

tition for certiorari in that matter seeks review of a Fourth Circuit ruling which it says encompasses the Tort Claims Act question but requests that the Court defer action pending disposition of the case *sub judice*. Assuming *arguendo* that it would be appropriate to consider an issue never raised below in one case because it was preserved in another,<sup>10</sup> an examination of the Court of Appeals' opinion and the petition for certiorari in *Moffitt v. Loe* shows that the Tort Claims Act issue is not fairly presented in that case either.<sup>11</sup>

<sup>10</sup> Petitioners cite no authority for this novel proposition, and our research has disclosed none.

<sup>11</sup> Loe filed suit against federal officers, state officers, and state employees claiming that they had deliberately denied him adequate medical treatment for a broken arm sustained by him while being held in a local jail in pretrial federal custody. His complaint was dismissed for failure to state a claim upon which relief could be granted. After that dismissal, Loe filed two subsequent complaints essentially repeating the allegations of the original pleading. These were also dismissed, on grounds of *res judicata*. All three rulings were appealed by Loe, and during oral argument in the Fourth Circuit on the consolidated appeals, Loe's counsel conceded that the second and third complaints did not raise any new issues, and that a decision as to the initial complaint would be dispositive. *Petition for Certiorari* in No. 78-1260, at 3a n.1. Thus, the Court of Appeals addressed only the initial complaint. As described by that court:

The questions before us are whether Loe alleged a cause of action against the state defendants, whether he has a cause of action against the federal defendants, and, if so, whether he sufficiently alleged it. *Id.*

In its petition for certiorari in *Loe*, the government does not seek review of any substantive holding by the Court of Appeals. Instead, it alleges that one of the subsequent complaints filed by Loe sought relief under the Federal Tort Claims Act, *id.* at 6-7, and that this complaint was "dismissed erroneously [by the district court] on the ground of *res judicata*," *id.* at 8 n.8. The Question Presented by the Petition, however, is whether a remedy for constitutional violations can be implied where the Federal Tort Claims Act provides an adequate federal remedy. *Id.* at 2.

This Question Presented in *Loe* is simply not raised by the record. Neither the majority of the Court of Appeals nor the dissent made any mention of the Tort Claims Act, much less decided the question

Second, the government suggests that the survivorship issue is "independently worthy of plenary review" and therefore, as a matter of sound judicial administration, the Court should decide the Tort Claims Act issue as well. Acceptance of this argument would constitute a precedent that, so long as one issue was "independently worthy of plenary review," other collateral questions would be entitled to consideration if included among the Questions Presented. Such a disposition would add a new dimension to the recognized rule that a *prevailing* party may make alternative arguments, although not passed upon by the lower courts, in support of his judgment. Acceptance of the petitioners' submission would mean that a *losing* party could advance novel legal theories for the first time in this Court by the simple expedient of including them in the "Questions Presented" and then arguing that "efficient judicial administration" requires that they be heard. It is difficult to see how the Court could entertain the petitioners' suggestion without undermining *Youakim* and the Court's many other relevant precedents. *E.g.*, *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Hicks v. Miranda*, 422 U.S. 332, 338 n.5 (1975). In any event, for the reasons discussed in Argument I.B. below, *amicus* believes that the survival issue is not "independently worthy of plenary review" because it is based upon a fundamental mischaracterization of Indiana's "wrongful death" act as a "survival" provision.

Finally, petitioners find it significant that the respondent addressed the merits of the claim in the Brief in Opposition to Certiorari. This, of course, is no reason at

on its merits. The dismissal on *res judicata* grounds of Loe's complaint which apparently sought relief under the Act is the law of the case. While Loe appealed that ruling to the Fourth Circuit, his separate Tort Claims Act contention was abandoned during the oral argument. The government cannot bootstrap the Federal Tort Claims Act issue in the instant case by arguing that it was properly raised in *Loe*.

all for the Court to vary its usual rule. There is no operative concept of waiver or estoppel which should influence this Court's determination whether an issue is in the proper posture and merits discretionary review.

In view of the fact that the Federal Tort Claims Act question was neither presented nor decided below, the Court should not reach the first Question Presented in the government's petition.

**B. The other "Question Presented" incorporates a misinterpretation of Indiana law, correction of which is not "independently worthy of plenary review" through this Court's *certiorari* jurisdiction.**

The second "Question Presented" in the petition is "[w]hether, if the Eighth Amendment creates such a right [to bring a direct constitutional cause of action], survival of that action is governed by federal common law rather than the state statutes that apply to analogous cases." The petitioners' entire argument on this point rests upon a misconstruction of Indiana law which fails to address the grounds upon which the Court of Appeals' decision rested.

We assume *arguendo* that it is appropriate to look to applicable state law for procedural details in a suit brought directly under the Constitution. But, contrary to petitioners' assertion, "[u]nder Indiana law, [not] all tort claims survive to some extent" (Pet. Br. at 47). Under the state's survival statute, Ind. Code Ann. § 34-1-1-1, there is a significant exception to the general rule that "[a]ll causes of action shall survive"—an exception covering every case in which an individual dies as a result of the injuries giving rise to the cause of action. (*See* Pet. Br. at 4.) Had Joseph Jones commenced this lawsuit prior to his death, under Indiana's survival statute it would clearly have abated when he died. This was

the holding of the court below, 581 F.2d at 673 n.8, and petitioners do not challenge this interpretation of Indiana law.

Petitioners do not seek to defend the harsh results which would inexorably follow application of Indiana's survival statute to suits where the victim dies from injuries inflicted in violation of the Constitution. Instead, they characterize Indiana's survival statute and its wrongful death statute (§ 34-1-1-2), *taken together*, as "permit[ting] survival of all actions" (Pet. Br. at 48). But the state's wrongful death act is totally inapplicable here.

Indiana's wrongful death statute creates a "cause of action to provide a means by which those who have sustained a loss by reason of the death may be compensated." *Pickens v. Pickens*, 255 Ind. 119, 126, 263 N.E.2d 151, 155 (1970); see Note, *Wrongful Death Actions in Indiana*, 34 IND. L. J. 108, 109 (1958-59). As described in *Bocek v. Inter-Ins. Exch. of Chicago Motor Club*, 60 Ind. Dec. 30, 369 N.E.2d 1093, 1096 (Ct. App. 1977):

This statutory creation of the right to sue in cases involving a wrongful death is intended to provide for the financial loss suffered by the widow, children or next of kin because of the death of the person involved. *New York Central R.R. Co. v. Clark, Extr.* (1964), 136 Ind. App. 57, 197 N.E.2d 646. It was specifically enacted to overcome the result occasioned by adherence to the old English case of *Baker v. Bolton* (1808), 1 Camp. 493, 170 Eng. Rep. 1033, in which the death of a human being was not considered a compensable injury. See, *Pickens v. Pickens* (1970), 255 Ind. 119, 263 N.E.2d 151. The statute therefore is not a remedy for the victim.

This is not the cause of action described in respondent's complaint.<sup>12</sup> The injury for which the plaintiff in this case seeks redress, as her son's personal representative, is the deprivation of Joseph Jones' constitutional rights, whereas the Indiana wrongful death act provides a means of redress for pecuniary losses suffered by survivors as a result of a decedent's death. Those are demonstrably different injuries. *Sea-Land Services v. Gaudet*, 414 U.S. 573, 575 n.2 (1974).

In *Jones v. Hildebrant*, *supra*, this Court emphasized the importance of identifying the cause of action in determining the source of procedural law in a suit for damages based on a claimed violation of the Constitution. The writ of certiorari was dismissed in that case because it became clear at oral argument that the theory of the plaintiff's action (deprivation of a mother's constitutional right to raise her child) was different from the cause of action which had been advanced in the Colorado courts, or which would have been covered by Colorado's wrongful death act.<sup>13</sup> The Court observed:

<sup>12</sup> As explained in respondent's Answer to Motion to Dismiss filed in the district court on November 30, 1976 (R. 36):

Defendant Commission mistakes the plain meaning of Plaintiff's Complaint in suggesting that it is governed or at all affected by the Indiana Wrongful Death Act. Plaintiff does not "allege a wrongful death action occurring in the State of Indiana," as stated in the Commission's Memorandum. Rather, as administratrix of her deceased son's estate, Plaintiff claims recovery for the willful violation of his rights under the Fifth and Eighth Amendments to the United States Constitution. This is not a case of a dependent survivor making a claim for pecuniary loss of support, but of the Estate of one who was deprived of fundamental human rights suing for justice in the form of money damages. It is in no way tied to the Indiana law of wrongful death.

<sup>13</sup> "The majority opinion in the Supreme Court of Colorado proceeds on the assumption that if the Colorado wrongful-death statute applied to petitioner's claim, her recovery would be limited

The question of whether a limitation on recovery of damages imposed by a state wrongful death statute may be applied where death is said to have resulted from a violation of 42 U.S.C. § 1983 would appear to make sense only where the § 1983 damages claim is based upon the same injuries.

*Jones v. Hildebrant, supra*, 432 U.S. at 187.<sup>14</sup>

In this case, the district court treated the plaintiff's constitutionally based claim as indistinguishable from the Indiana wrongful death action based upon its be-

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to \$45,000. It held that this limitation did apply even to the one count of petitioner's complaint based on 42 U.S.C. § 1983.

A necessary assumption for this position would seem to be that petitioner was suing to recover damages for injuries under § 1983 which were the same injuries as are covered by the state wrongful-death action. The question presented in the petition for certiorari is at the very least susceptible of that interpretation. But at oral argument, we were advised by counsel for petitioner that her sole claim of constitutional deprivation was not one of pecuniary loss resulting from her son's wrongful death, such as would be covered by the wrongful-death statute, but one based on her personal liberty. Her claim was described at oral argument as a constitutional right to raise her child without interference from the State; it has nothing to do with an action for 'wrongful death' as defined by the state law. Tr. of Oral Arg. 4-5; see also *id.*, at 8-13.

An action for wrongful death, under Colorado law, is an action which may be brought by certain named survivors of a decedent who sustain a direct pecuniary loss upon the death of the decedent. It is 'classified as a property tort action and cannot be classified as a tort action "for injuries done to the person,"' *Fish v. Liley*, 120 Colo. 156, 163, 208 P.2d 930 (1949). Petitioner, however, articulates here a quite different constitutional claim which does not fit into the Colorado wrongful-death mold." *Jones v. Hildebrant, supra*, 432 U.S. at 185-86 [footnote omitted] (emphasis in original).

<sup>14</sup> Petitioners seem to recognize this principle when, in describing the questions reserved by this Court in *Robertson v. Wegmann, supra*, they say: "First, the Court noted that a different result might obtain if the *pertinent* state survival law was generally inhospitable to constitutional tort claims" (Pet. Br. at 47) (emphasis added).

lief that "such statutes are the sole mechanism by which the personal representative of a decedent's estate may maintain an action for damages arising from the decedent's death." (Pet. at 26a.)<sup>15</sup> But this approach was rejected by the Court of Appeals, which stated:

It is important, however, to characterize plaintiff's complaint properly. The district court erred in its characterization. The plaintiff is suing neither for deprivation of another's constitutional rights nor on an independent statutorily created cause of action such as an action for wrongful death. Rather, she is asserting her son's cause of action as the administratrix of his estate.

581 F.2d at 672 n.4. The Court of Appeals went on to hold that *federal common law* could furnish the "mechanism by which the personal representative of a decedent's estate may maintain an action for damages" for injuries causing the decedent's death, a proposition with which even the petitioners are willing to agree (so long as the circumstances are, in their view, "extraordinary") (see Pet. Br. at 41). The petitioners did not, however, seek review in this Court of the Seventh Circuit's determination that the Indiana "wrongful death" act was inapplicable to this suit. Since that ruling completely removes the predicate for the petitioners' "survival" argument, the issue they seek to have this Court decide is simply not in the case.<sup>16</sup>

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<sup>15</sup> Petitioners do not defend the district court's resolution of this issue on its own terms but make a different argument: that what they characterize as "Indiana survival law" (the survival and wrongful death statutes, taken together) is generally hospitable to claims of constitutional violation. But their Brief totally fails to meet the critical ruling of the court below on the construction of Indiana law. See text *infra*.

<sup>16</sup> This is not, therefore, a case like *Robertson v. Wegmann*, where an applicable state survival statute existed and was available for adoption in the federal suit, although it would cause some individual actions to abate. The Indiana wrongful death act does not apply at all to the cause of action asserted by the plaintiff.

Because we believe that the first Question Presented is an issue not properly preserved below, and that the second is based upon a misunderstanding of Indiana law and how it relates to this case (implicating an unchallenged ruling of the Court of Appeals), we urge the Court to dismiss the writ of certiorari as improvidently granted. *Wolf v. Weinstein*, 372 U.S. 633, 636 (1963). The important issues seemingly raised by the case, and contained in the petition for certiorari, are not presented on this record. *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972); *McClanahan v. Morauer & Hartzell*, 404 U.S. 16 (1971); *Bostic v. United States*, 402 U.S. 547 (1971); *Jones v. State Bd. of Educ.*, 397 U.S. 31 (1970); *Palmeri v. Florida*, 393 U.S. 218 (1968); *Williams v. Zuckert*, 371 U.S. 531 (1963); *Needelman v. United States*, 362 U.S. 660 (1960); *McCarthy v. Bruner*, 323 U.S. 673 (1944); *Tyrrell v. District of Columbia*, 243 U.S. 1 (1917).

## II

### FEDERAL COMMON LAW WAS PROPERLY APPLIED BY THE COURT BELOW IN THIS ACTION TO REDRESS THE DEPRIVATION OF JOSEPH JONES' CONSTITUTIONAL RIGHTS.

#### Introduction

We have set forth above the reasons why we believe the Court should not reach the merits in this case. Should the Court conclude otherwise, then the judgment below must be affirmed.

With respect to the *Bivens* issue,<sup>17</sup> we fully support the result reached by the Seventh Circuit. The government's Federal Tort Claims Act assertion is not substantiated by either the statute's legislative history or logical analysis; but we leave development of these points to the

<sup>17</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

parties and other *amici*.<sup>18</sup> The survivorship inquiry is of considerable concern to the Lawyers' Committee (see statement of Interest, *supra*), and we address it at greater length in the balance of this Brief.

We urge more than mere affirmance of the judgment below. This Court should relieve federal trial judges from the burden of canvassing and analyzing state survival statutes as a preliminary matter whenever they entertain litigation to vindicate the constitutional rights of one whose death was caused by the violation of those rights. At least in such cases—if not in all suits to redress infringement of constitutional guarantees—the question of survival of the cause of action should be governed by uniform standards as a matter of federal common law. Nothing in 42 U.S.C. § 1988 or the Rules of Decision Act precludes this Court from determining and announcing that this procedural issue is inappropriate for resolution according to the congeries of state law provisions which touch upon it.

<sup>18</sup> The government's argument addresses the Eighth Amendment question. However, the Complaint in this case, fairly read, also includes a claim based upon racial discrimination violative of the Fifth Amendment. See note 1 *supra*. "[T]his Court has already settled that a cause of action may be implied directly under the Equal Protection Component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right." *Davis v. Passman*, — U.S. —, —, 60 L. Ed. 2d 846, 861 (1979) (footnote omitted), citing *Bolling v. Sharpe*, 347 U.S. 497 (1954). Whatever may be the reach of the Tort Claims Act to a failure to provide medical treatment, we have been able to find no reported case in which the Act has been interpreted to provide a remedy for racial discrimination. Cf. 28 U.S.C. § 2680(h).

A. At least where death is alleged to have resulted from unconstitutional actions, federal common law should govern the question of survival of the right of action to be brought by a decedent's estate or personal representative.

We contend in Argument II.B., below, that the judgment of the Court of Appeals in this case can be sustained because of the patent inadequacy of the survival law of the particular forum state involved. But we believe the district court's confusion about which Indiana law was applicable to the survivorship issue provides a good illustration of the errors which could be avoided, and the judicial time and energy which could be saved if this Court were to announce that survival questions in constitutional cases should be governed by federal common law. At the very least, the Court should adopt this approach in cases in which the constitutional violation is alleged to have caused death.<sup>19</sup>

We are in full agreement with the petitioners "that the issue of what law governs the survival of constitutional damage actions is a question of federal law." We also agree that "Congress often does not supply all of the procedural details of a federal remedial scheme," and that simply because the origins of the respondent's cause of action are federal, state law is not rendered necessarily irrelevant. Pet. Br. at 42.<sup>20</sup> What we cannot ac-

<sup>19</sup> In our *amicus* brief in *Jones v. Hildebrandt*, *supra*, we suggested that the Court create a uniform federal common law of survival and wrongful death under § 1983 in order to avoid the difficulties inherent in borrowing state statutes, and in order to vindicate the purposes of the Civil Rights Act of 1871. *Brief for the Lawyers' Committee, et al. as Amici Curiae* at 44-49. That course seemed to us to be appropriate in a case which, until oral argument, appeared to resemble closely a "wrongful death" action. See *Jones v. Hildebrandt*, *supra*, 432 U.S. at 185-86; but see *Brief for the Lawyers' Committee, et al. as Amici Curiae* at 20-31.

<sup>20</sup> Our only disagreement with the Court of Appeals in this case concerns the basis for the examination of state law. In *Robertson*

*v. Wegmann*, *supra*, the Court interpreted the provisions of 42 U.S.C. § 1988 in the context of a suit under § 1983 alleging a violation of constitutional rights. The Court held that, when federal law is deficient, § 1988 instructs a trial court to utilize "the common law, as modified and changed by the Constitution and statutes of the [forum] State," as long as those are "not inconsistent with the Constitution and laws of the United States." The Court of Appeals in this case acknowledged that, where a suit is predicated not on § 1983 but on the Constitution itself, § 1988 "has no statutory effect." 581 F.2d at 673. Nevertheless, the Court of Appeals decided to utilize § 1988 because, in its view, "actions brought under the civil rights acts and those of the *Bivens*-type cases are conceptually identical and further the same policies . . ." *Id.* at 669. The fact of the matter, however, is that by its terms this statute has no application beyond prescribing a procedure to be followed in causes of action created by the Civil Rights Acts. In *Robertson v. Wegmann*, perhaps the key difference between the majority and dissenting opinions was, as stated by Mr. Justice Blackmun, "the Court's apparent conclusion that, absent . . . an extreme inconsistency, § 1988 restricts courts to state law on matters of procedure and remedy." 436 U.S. at 596 (dissenting opinion).

The fact that § 1988 does not apply to a *Bivens*-type cause of action does not mean that state law has no role to play. The appropriate principles are set forth in the Rules of Decision Act, 28 U.S.C. § 1652, which provides:

. . . the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

This Court has never regarded the Rules of Decision Act as requiring the application of state laws to every matter not covered by a federal statute or rule. See generally, *Brief for the Lawyers' Committee for Civil Rights as Amicus Curiae*, *Robertson v. Wegmann*, *supra*, at 17-29. To the contrary, this Court has frequently determined that the creation of interstitial common law is necessary to carry out federal substantive law and policy. *E.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Farmers Educ. & Coop. Union v. WDAY*, 360 U.S. 525 (1959); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Clearfield Trust Co. v. United States*, 318 U.S. 363

cept is the government's bald statement, unsupported by any disclosed authority, that "federal law adopts the relevant state standard unless application of local law would *utterly* defeat the federal interests involved." *Id.* (emphasis added).

While this Court has "... occasionally selected state law" as the federal rule, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), it has also made determinations (based upon underlying federal policy) that uniform federal common law must govern the determination of specific issues or cases. *E.g., id.; United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973). See also Note, *Federal Common Law*, 82 HARV. L. REV. 1512 (1969). Even with respect to issues traditionally governed by state law, in a federal cause of action, a court still "must inquire whether the need exists for

(1943); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942); *Jackson County v. United States*, 308 U.S. 343 (1939); see generally Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). A clear and concise exposition of the relevant principles appears in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 590-93 (1973):

... The suggestion is that this Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), compels application of state law here because the Rules of Decisions Act, 28 U.S.C. § 1652, requires application of state law in the absence of an explicit congressional command to the contrary. We disagree.

...

... Since *Erie*, and as a corollary of that decision, we have consistently acted on the assumption that dealings which may be "ordinary" or "local" as between private citizens raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision; particularly is this so when transactions undertaken by the Federal Government are involved, as in this case. In such cases, the Constitution or Acts of Congress "require" otherwise than that state law govern of its own force.

... the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. ...

federal law to further federal policies or foster uniformity. If either circumstance is present, it must weigh the benefits promised by local solution against the need for a national rule." *Id.* at 1531. Such an analysis convinces *amicus* that the issue of survival of the cause of action—at least where the violation of the federal Constitution or law is alleged to have resulted in death<sup>21</sup>—should not be controlled by state law. *Cf. Basista v. Weir*, 340 F.2d 74, 86-87 (3d Cir. 1965).

This Court emphasized the need for an independent, uniform federal law of remedy for constitutional violations in its decision in *Bivens*, *supra*. In that case, the Court rejected an argument that the petitioner's Fourth Amendment rights were essentially rights of privacy and therefore creations of state and not federal law.<sup>22</sup> In his

<sup>21</sup> We believe the same principle should be applicable to all questions of survival in actions to redress federal constitutional or legal violations, see *Robertson v. Wegmann*, *supra*, 436 U.S. at 599-601 (dissenting opinion), but the Court need not decide the broader issue in the instant case.

<sup>22</sup> According to this argument, *Bivens'* cause of action sounded in tort and would have to be brought in state court. The only significance of the Fourth Amendment would be "to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power . . ." 403 U.S. at 390-91. The Court rejected this scenario because it could not accept the notion that, when a federal agent exercises his authority in an unconstitutional manner, he is no different from any private citizen. The Court explained:

... the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. at 684 (footnote omitted); see *Bemis Bros. Bag Co. v.*

opinion concurring in the judgment, Justice Harlan pointed out that

... the limitations on state remedies for violation of common-law rights by private citizens argue in favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court's opinion today discusses in detail. See *Monroe v. Pape*, 365 U.S. 167, 195 (1961) (HARLAN, J., concurring). It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability. See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *Monroe v. Pape*, *supra*, at 194-195 (HARLAN, J., concurring); *Howard v. Lyons*, 360 U.S. 593 (1959). Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs. Cf. *United States v. Standard Oil Co.*, 332 U.S. 301, 305-311 (1947).

403 U.S. at 409 (emphasis added).<sup>23</sup>

Petitioners reject any need for uniformity, citing decisions which applied state statutes of limitations to federal causes of action. But unlike statutes of limitations, whose purpose is to provide assurance that one will not

*United States*, 289 U.S. 28, 36 (1933) (Cardozo, J.); *The Western Maid*, 257 U.S. 419, 433 (1922) (Holmes, J.).

403 U.S. at 392. The Court further observed that "the interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." 403 U.S. at 394.

<sup>23</sup> The Court of Appeals concluded that "[t]he liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred." 581 F.2d at 675.

be held to answer for conduct long past, survival statutes serve no interest in repose; abatement of the litigation because of the death of the victim arbitrarily cuts off all opportunity to redress the injury.<sup>24</sup> Whatever may be the justification for allowing this result in litigation to enforce state-created tort interests, there is no adequate reason to permit the vindication of constitutional rights, and the deterrence of unconstitutional conduct, to be impeded because of the death of one who claimed denial of his rights. Such a result completely frustrates the purposes of the federal Civil Rights Acts.

Petitioners rely principally upon *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), holding that the timeliness of a suit brought to enforce a collective bargaining agreement under § 301 of the Labor-management Relations Act would be governed by a state statute of limitations. In that case, the Court acknowledged that the subject matter of § 301 is "peculiarly one that calls for uniform law" but found that the specific problem before it—the timeliness of bringing suit—was not of that genre:

The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy.

383 U.S. at 702. Petitioners assert that, like statutes of limitations, the law governing survival of constitutional

<sup>24</sup> See *Ingram v. Steven Robert Corp.*, 547 F.2d 1260, 1262 n.2 (5th Cir. 1977).

damages actions does not become an issue until after the policy of deterring federal officials from unconstitutional behavior has failed in its purpose." Pet. Br. at 44. But there is no equivalent of the National Labor Relations Board which exerts day-to-day control over the actions of federal prison officials to prevent constitutional violations. Hence litigation plays a critical role in establishing a credible deterrent to such conduct. Cf. *District of Columbia v. Carter*, 409 U.S. 418, 427 (1973).

The *Hoosier* Court was speaking, in the passage set out above, only to the relative unimportance of uniformity in the context of matters outside the framework of collective bargaining; i.e., the formation of the contract and private settlement of disputes.<sup>25</sup> Its reasoning hardly applies to the survival of constitutionally based damages actions, the objectives of which are not "the smooth functioning of . . . consensual processes" but rather the compensation of victims of official brutality, and the deterrence of those clothed with the power of the federal government from violations of constitutionally protected rights.

Petitioners' attempt to create an analogy with cases applying state statutes of limitations to federal causes of action fails because it tries to make too much of superficial similarities. Statutes of limitations cases form a distinct body of law, primarily because the impact of applying state limitations is ordinarily confined to the litigation and does not affect the federal interests in compensation for, and deterrence of, unconstitutional conduct. Moreover, in most cases, preservation of a cause

<sup>25</sup> Issues concerning the formation of the bargaining agreement and enforcement of arbitration clauses—which involve the lifeblood of § 301—are governed by federal law. *Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); cf. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

of action by timely filing is wholly in control of the wronged party (or the legal representative of the wronged party).<sup>26</sup> Application of state survival law, as exemplified by the instant case, may destroy a cause of action for reasons totally beyond the victim's control.

Petitioners also argue that, since laws of survivorship involve "traditionally local matters" such as inheritance laws and domestic relations, the case for a uniform law of survival is even weaker than the case of statutes of limitations. But this was precisely the thesis rejected in *United States v. Little Lake Misere Land Co.*, *supra*, where the Court held that the impact on a federal regulatory program required the creation of interstitial federal common law even though property law was traditionally found in the statutes and decisions of the states. 412 U.S. at 584-85.

It is also insignificant that wrongful death and survival laws, like statutes of limitations, are "inherently statutory in nature." Petitioners argue that "in the absence of common law analogues, the courts are less able to fashion such rules." Pet. Br. at 45. But the Court has done precisely this in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), where it abandoned reliance on state wrongful death statutes in admiralty law. A full and complete answer to petitioners' contention is found in the following statement by the unanimous Court in *Moragne*:

These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no

<sup>26</sup> Thus, for example, the only reason the choice-of-law issue arose in *International Union v. Hoosier Cardinal Corp.*, *supra*, is that the plaintiffs tried for years to litigate their claim in the Indiana state courts. "Almost four years after the dismissal of that lawsuit by the Indiana trial court, and almost seven years after the employees had left the company, the union filed the present action in the United States District Court for the Southern District of Indiana." 383 U.S. at 699.

present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

398 U.S. at 390.

It is true that this Court's opinion in *Robertson v. Wegmann*, *supra*, interpreting § 1988, and the approach to the Rules of Decision Act outlined in *United States v. Little Lake Misere Land Co.*, *supra*, permit the determination whether state law "supplements and fulfills federal policy"<sup>27</sup> to be made on a case-by-case basis. It is also true that this Court in *Robertson* rejected an argument that the need for uniformity compelled rejection of state law in that case. The majority there was careful, however, to "intimate no view . . . about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." 436 U.S. at 594.

We respectfully submit that the answer to that reserved question is undoubtedly a negative one (*see pp. 32-35 infra*). Thus, there is no point in requiring federal trial courts to look to state survival statutes only to supersede them with federal common law in the event that they would abate a suit where the unconstitutional action claimed the victim's life.<sup>28</sup> The Court should announce

<sup>27</sup> *International Union v. Hoosier Cardinal Corp.*, *supra*, 383 U.S. at 709 (White, J., dissenting).

<sup>28</sup> This Court has created federal common law in a variety of circumstances to effectuate the purposes of the civil rights acts

a uniform rule of survival in such cases, just as in *Moragne v. States Marine Lines*, *supra*, 398 U.S. at 409, it overruled *The Harrisburg*, 119 U.S. 199 (1886) and created a uniform federal maritime wrongful death action instead of merely overruling *The Tungus v. Skovgaard*, 358 U.S. 588 (1959) to permit federal courts on a case-by-case basis to disregard state law limitations on maritime claims. *See also, Sea-Land Services v. Gaudet*, *supra*.

**B. In the circumstances of this case, the Indiana law of survival is inconsistent with the purposes of the federal cause of action and was properly rejected by the court below in favor of federal common law.**

**1. Indiana's wrongful death statute does not apply to this lawsuit.**

We have argued above that the Court of Appeals correctly declined to approve the district court's action recasting respondent's Complaint as a "wrongful death"

without reference to state law. In *Carey v. Piphus*, 435 U.S. 247, 257-59 (1978), the Court rejected the notion that denials of procedural due process were not compensable. The Court recognized the fact that in some cases, the interests protected by a particular constitutional right may not be protected by an analogous branch of the common law of torts (without any discussion of the specific law of the forum state). Adapting common law rules to provide fair recompense for constitutional violations is a delicate task, but as the Court said:

The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.

435 U.S. at 258. In fashioning federal common law to arrive at an appropriate damages remedy, the Court carefully analyzed the federal interests involved. Such an approach is surely warranted where the issue is not the form of compensation but whether the federal cause of action survives at all. *See also, Imbler v. Pachtman*, 424 U.S. 409, 417-19 (1976); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

suit. See pp. 16-17 *supra*. Petitioners did not seek review of that holding. Even if the question were properly here, petitioners' arguments in support of the applicability of Indiana's "wrongful death" statute are unpersuasive under either § 1988 or the Rules of Decision Act.

Petitioners would have trial courts adopt any state survival or wrongful death statute involving a tort which happens to be on the books of the forum state. Their expansive reference to "analogous" statutes, which provides the springboard for their argument that the limitations on damages recoverable under Indiana's wrongful death statute do not "utterly" defeat the underlying purposes of constitutionally based damages actions, is ill-conceived and is not supported by this Court's decisions interpreting § 1988 or the Rules of Decision Act.<sup>29</sup>

*Robertson v. Wegmann, supra*, for example, suggests the contrary. The Court there found it unnecessary to resolve whether the reference to "the common law" in § 1988 might mean federal common law, as opposed to decisional law of the forum state, explaining:

It makes no difference for our purposes which interpretation is the correct one, because Louisiana has a survivorship statute that, under the terms of § 1988, plainly governs this case.

<sup>29</sup> With respect to one issue: statutes of limitations (an area in which the federal interest has traditionally been viewed as very attenuated, see pp. 24-27 *supra*), courts do seek to determine what state-created limitations period would be applied to an "analogous" cause of action under state law. *Beard v. Robinson*, 563 F.2d 331, 334-35 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978), and cases cited. There is often considerable difficulty in deciding which provision of state law covers "analogous" actions, see *id.* at 335-38; *Runyon v. McCrary*, 427 U.S. 160, 179-82 (1976). When no clearly applicable provision can be identified, "catch-all" limitations periods are adopted. *Beard v. Robinson, supra*, 563 F.2d at 338; *Crosswhite v. Brown*, 424 F.2d 495 (10th Cir. 1970); cf. *Madison v. Wood*, 410 F.2d 564 (6th Cir. 1969). No similar course is available in the survivorship area.

436 U.S. at 589 n.5. The necessary implication is that, absent a survivorship statute which plainly governs the case, even under § 1988 a federal common law of survival must be created if abatement of a cause of action would be inconsistent with federal policy concerns.<sup>30</sup> Similarly, in *Jones v. Hildebrant, supra*, this Court said that application of a state statute "would appear to make sense only where the § 1983 damages claim is based upon the same injuries" which would give rise to the state cause of action. 432 U.S. at 187.

In Rules of Decision Act cases where there is no clearly controlling state statute which can be applied, the decision whether to "borrow" some analogous provision of state law also is not automatic, but depends upon consistency with federal purposes. See *United States v. Little Lake Misere Land Co., supra*, 412 U.S. at 604;<sup>31</sup> cf. *Klimas v. International Tel. & Tel. Corp.*, 297 F. Supp. 937 (D.R.I. 1969) (district court in diversity action not bound by state Supreme Court holding which federal judge believes state court would overrule as soon as opportunity arises) (*dictum*).

There simply is no justification for applying Indiana's wrongful death legislation to this case.

<sup>30</sup> This is precisely the methodology followed by the Court of Appeals in this case. There being no Indiana statute on point, the court turned to federal common law. See Theis, *Shaw v. Garrison: Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681, 684-85 (1976). The petitioners have neither argued that § 1988 refers to state decisional law nor suggested that there is any Indiana decisional law that would support their position.

<sup>31</sup> "Once it is clear that Act 315 has no application here, we need not choose between 'borrowing' some residual state rule of interpretation or formulating an independent federal 'common law' rule; neither rule is the law of Louisiana yet either rule resolves this dispute in the government's favor."

**2. *Indiana's survival statute is also inapplicable to this lawsuit.***

The Court of Appeals viewed Indiana's survival statute, Ind. Code Ann. § 34-1-1-1, as inapplicable to this suit, because it made no provision whatever for survival of a cause of action for injuries which proved fatal. See pp. 6, 13-14 *supra*. The petitioners have not contested this ruling, and we assume that it is the established law of this case. The choice-of-law question presented, therefore, is *whether in the absence of any applicable state legislation*, the Court of Appeals was correct in creating federal common law to permit survival of this constitutionally based damage action.

**3. *Allowing this action to abate because the forum state's law failed to provide for its survival would be flagrantly unjust and contrary to the goals of compensation and deterrence which are served by creation of the action.***

Under Indiana law, no provision is made for the survival of a cause of action to recover damages for injuries from which an individual dies. Can this "forum state law" be applied to a constitutional damages action? Petitioners state in their brief that "convenience and jurisprudential limitations" favor adoption of state survival rules as the "desirable approach," a conclusion which they say is "strongly supported, if not compelled by the Rules of Decision Act." Pet. Br. at 45. The Court of Appeals made a contrary determination, based upon its understanding of the principles enunciated by this Court in *Robertson v. Wegmann*, *supra*, construing 42 U.S.C. § 1988. Whichever analysis—§ 1988 or the Rules of Decision Act—is utilized,<sup>32</sup> the result reached by the Court

<sup>32</sup> See note 20 *supra*.

of Appeals<sup>33</sup> must be affirmed. Permitting a direct constitutional action to abate when the victim of official brutality or gross neglect dies from his injuries defeats the purposes served by such an action. This requires the creation of a federal common law of survival.

In *Robertson v. Wegmann*, the Court found that the policies underlying § 1983 include both compensation of persons wronged by a deprivation of federally protected rights and "prevention of abuses of power by those acting under color of . . . law." 436 U.S. at 591. These policies are equally central to a *Bivens*-type action, and it virtually goes without saying that extinguishment with his death of any constitutional claims which a decedent may have had frustrates these interests. Even if the policy of compensating the wronged person would not be completely thwarted, because his estate could recover pecuniary losses in a state-created cause of action, the goal of curbing abuse of power by officials would be severely impeded.<sup>34</sup>

<sup>33</sup> The Court of Appeals determined that Indiana survival law should not be applied here because it would result in complete abatement of Joseph Jones' cause of action, a determination which we support in this section. On the assumption that Indiana's "wrongful death" statute should have been adopted, a contention we have already shown to be inconsistent with this Court's prior rulings, we respond in the following section to the petitioners' assertion that the statute's damages limitation is acceptable as applied to this *Bivens*-type action.

<sup>34</sup> In a footnote, petitioners represent that this Court ruled in *Carey v. Phipps*, *supra*, that compensation was the basic purpose of constitutional damage actions, and that deterrence is "inherent in the award of compensatory damages." Pet. Br. at 50 n.48. The implication is that through recovery of such damages as are allowed in an Indiana wrongful death action, the deterrent purposes of federal law can be satisfied. But the opinion in *Carey* expressly states, although finding no basis for an award on the record before the Court: "This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights." 435 U.S. at 257 n.11. The Court concluded by holding out the possibility that attorneys' fees might

The crucial distinction between *Robertson*<sup>35</sup> and this case is that, in the former, Louisiana law permitted the type of action maintained by Shaw's executor to survive, generally. It abated only because Shaw was not outlived by any of the statutorily designated kin. Thus, the Court held that abatement of the cause of action in that instance was truly due to circumstances unique to Shaw. But the Court stated that "[a] different situation might well be presented . . . if state law did not provide for survival of any tort actions . . . or if it significantly restricted the types of actions that survive." 436 U.S. at 594. That is precisely the situation here. Indiana law fails to provide for the survival of a cause of action for an entire class of victims of tortious—including unconstitutional—conduct: those who die of their injuries. By restricting survivorship rights in this manner, Indiana's statute is an "unreasonable" one. *Robertson v. Wegmann*, *supra*, 436 U.S. at 592.

There is no escaping the conclusion, which the Court of Appeals reached in this case, that it would subvert the policy of allowing complete vindication of constitu-

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also be available to provide "additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights." *Id.*

<sup>35</sup> In *Robertson* the question was whether Clay Shaw's § 1983 damage suit against New Orleans District Attorney Jim Garrison for the latter's allegedly bad faith prosecution of Shaw for the Kennedy assassination should abate following Shaw's death from unrelated causes. Under Louisiana's survival statutes, the action would abate because Shaw left no widow, parent, or dependent kin. The Fifth Circuit ruled that Shaw's executor could continue the suit because Louisiana law was "inconsistent with the Constitution and laws of the United States" under § 1988 insofar as it would cause the suit to abate. Reversing, this Court held that, where the decedent died from causes having no connection with the alleged constitutional violations, it did not defeat the compensatory and deterrent purposes of § 1983 to apply Louisiana's survival statute even though in the particular circumstances of that case, doing so would cause the action to abate.

tional rights to sanction a rule that would permit Jones to obtain redress for violations of his rights if he lived, but foreclose recovery by the fortuitous circumstance of his consequent death. Petitioners suggest that, "except perhaps for the hypothetical case of a federal official who, in depriving a person of his constitutional rights, kills rather than maims because of a peculiar local survival statute, state laws of survivorship simply do not affect or regulate primary daily activity." (Pet. Br. at 44.) But it is not farfetched to assume that the "primary daily activities" of administrators or officers of a federal prison in a state like Indiana will be affected by knowledge that they are not individually responsible in substantial damages for the death of prisoners resulting from their unconstitutional actions or omissions. See *Robertson v. Wegmann*, *supra*, 436 U.S. at 600 (Blackmun, J., dissenting); *Jones v. Hildebrand*, *supra*, 432 U.S. at 190-91 (White, J., dissenting). It does not require a vivid imagination to envisage that, if the decision below is reversed, federal prison officials will feel little compulsion to correct the alleged horrible conditions at the Terre Haute prison hospital which caused Jones' death. Deterrence depends upon individual responsibility, and upon the knowledge on the part of officials within the federal prison bureaucracy, the hospital accrediting agency, and the health care profession who are entrusted with prisoners' lives, that they will be held accountable in money damages for their actionable conduct. See *Estelle v. Gamble*, *supra*.<sup>36</sup>

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<sup>36</sup> This would be true even if, as the government claims, an action against the United States lies under the Federal Tort Claims Act. Damages paid by the U.S. Treasury, rather than by the individual, are a much less effective incentive for the responsible officials to take corrective action.

4. *If the district court was correct in applying the Indiana "wrongful death" statute, it nevertheless erred in adopting the limitation on recoverable damages of that provision.*

Should the Court conclude, contrary to the views expressed above, that the trial judge acted properly in viewing Mrs. Green's complaint as the equivalent of a suit brought under Indiana's "wrongful death" statute, Ind. Code Ann. § 34-1-1-2, we believe that the judgment below must still be sustained. The limitation on recoverable damages which is contained in that law cannot be applied to a constitutional damage action consistently with the underlying purposes of the suit, just as the state's survival statute cannot be applied so as to result in abatement.

In *Jones v. Hildebrant*, *supra*, the Colorado Supreme Court (two Justices dissenting) held that a federal cause of action under § 1983 merged with the state action for wrongful death. One consequence of this view was that Colorado's limitation of damages for wrongful death to "net pecuniary loss" was deemed to be appropriate in the case of a violation of the decedent's federal constitutional rights. This conclusion stemmed from the Colorado court's fundamentally erroneous view that a § 1983 action was identical to a cause of action under the state's wrongful death act.<sup>37</sup> Whatever the reasonableness of a "net pecuniary loss" rule in promoting adjustment of the burden of loss caused by negligence and other tortious conduct, such a limitation does not further the protection of federal constitutional interests.<sup>38</sup>

<sup>37</sup> See *Brief for the Lawyers' Committee for Civil Rights et al. as Amici Curiae*, *Jones v. Hildebrant*, *supra*, at 20-31.

<sup>38</sup> In *Sea-Land Services v. Gaudet*, *supra*, this Court held that the "net pecuniary loss" rule is an unacceptable measure of damages in *Moragne*-type wrongful-death cases. If such restrictions on the complete-justice principle are inappropriate in admiralty, *a fortiori*

In effect, the district court in this case "merged" the state wrongful death act into the *Bivens* action in accordance with its view that a constitutional action could not proceed without the state's wrongful death mechanism, and then applied the state law's limitation on damages without evaluating the impact on federal interests.

Petitioners stress the fact that the wrongful death act permits a substantial recovery unless the decedent leaves no widow, dependent child, or dependent next of kin. But the issue is not, as the petitioners contend, whether Indiana law "reduces the windfall relief available to non-dependent, non-spousal relatives." Pet. Br. at 49. Where deterrence of unlawful conduct is a paramount concern, as in this *Bivens*-type action, and that conduct causes the victim's death, the ultimate disposition of a damage award is of no moment. The goal is to avoid future death resulting from abuse of authority. Limiting the amount of recoverable damages impedes accomplishment of this goal (1) by making it uneconomical for anyone but spouses and dependent relatives to bring suit, and (2) by eliminating any expectation on the part of public officials that they will have to respond in a meaningful way for their unlawful conduct.<sup>39</sup>

The connection between the unconstitutional conduct and the victim's death serves to distinguish this case from *Robertson*, where there was no causal relationship between Shaw's death and the defendant's conduct. Death

they are unacceptable here. See Page, *State Law and the Damages Remedy Under the Civil Rights Act: Some Problems in Federalism*, 43 DEN. L.J. 480, 489 (1966).

<sup>39</sup> The petitioners may be correct that the untrained nurse did not inject Jones with the wrong drug because of his awareness of the intricacies of Indiana survivorship law. But the knowledge that a person in such a position will be held responsible in damages for his conduct will most assuredly serve the policy of deterrence which underlies civil rights actions and lawsuits based on the violation of federal constitutional rights.

which *results* from unconstitutional conduct is a part of the constitutional violation. The federal interest in assuring adequate redress for what is essentially "capital punishment" in violation of the Constitution is greater than the interest that *a particular action* survive the death of the victim from natural causes.

In the *Robertson* context, it was perhaps explicable to say that "surely few persons are not survived by one of these close relatives. . . ." 436 U.S. at 591-92. But where the object is to prevent future "executions" without due process of law by those wielding the power of life and death, this is not an acceptable supposition. Ultimately, at least in Indiana, the rule urged by the government cheapens the lives of the many federal prisoners who, like Jones, are young, black, unmarried, and childless.<sup>40</sup>

<sup>40</sup> As pointed out by the district judge in his order dismissing the respondent's Complaint (Pet. App. at 27a), her Petition for Letters of Administration filed (before this suit was instituted) in her son's estate in the Probate Division of the Circuit Court of Cook County discloses that his estate consists of a potential state cause of action worth \$500. It does not appear who filled this amount in, but it would probably be an accurate assessment of the pecuniary value of an action under Indiana's wrongful death act.

## CONCLUSION

For the reasons set forth above, the judgment below should be affirmed or, in the alternative, the writ of *certiorari* should be dismissed as improvidently granted.

Respectfully submitted,

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